In the Matter of the Compensation of
MICHAEL T. JONES, Claimant
WCB Case No. 22-04153, 22-03307
ORDER ON REVIEW
Welch Bruun & Green, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ceja.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that: (1) found that claimant did not establish "good cause" for his untimely filed hearing request regarding the SAIF Corporation's denial of his injury claim for a back condition; and (2) dismissed his hearing request. On review, the issues are good cause and, potentially, compensability, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

On October 1 or 2, 2021, claimant slipped and fell on a truck bed and landed on his buttocks. (Ex. 1; Tr. 5-7). The next morning, he felt severe pain in his low back, right hip, and right leg. (Tr. 8-9).

A few days later, claimant called the Veterans Affairs (VA) medical clinic to schedule an appointment, but the clinic did not have an opening until later that month. (Ex. 2-2-3; Tr. 9-10).

On October 19, 2021, claimant saw Ms. Hunter, a nurse practitioner at the VA clinic, who recorded that claimant had slipped and fell on the back of a truck. (Ex. 2-3). She noted significant back pain with pain radiating down the right leg and diagnosed back pain with sciatica/radiculopathy. (Ex. 2-4). In addition, Ms. Hunter provided an anti-inflammatory shot, prescribed muscle relaxant and anti-inflammatory medications, and referred claimant to a chiropractor. (*Id*.)

In November 2021, claimant began treating with Dr. Mah, a chiropractor. (Ex. 3). He noted low back pain radiating down claimant's right leg. (Ex. 3-1). He referenced claimant's treatment at the VA clinic and performed spinal manipulation, intersegmental traction, and ultrasound therapy. (Ex. 3-1-2).

In December 2021, Dr. Mah recorded low back pain and radiating pain from claimant's right low back to his right thigh. (Exs. 4-1, 7-1, 8-1). He noted low back muscle tightness, spinal restrictions at L4 and L5, and positive radiation in the right leg with a straight leg raise test. (Exs. 4-1, 6-1, 7-1, 8-1).

A January 2022 MRI report identified an L4-5 disc extrusion, osteoarthritis at L3-4 and L5-S1, and stenosis at L3-4 and L4-5. (Ex. 10).

On March 14, 2022, Dr. Bell, an orthopedist, performed a records review at SAIF's request. (Ex. 13). He opined that the work incident was not then, nor was it ever, a material contributing cause of claimant's disability or need for treatment because of claimant's "large" delay in treatment after the work incident and his arthritis issues. (Ex. 13-5). He explained that claimant's medical records did not document back pain or a work-related injury until December 7, 2021. (Ex. 13-1-2). He did not reference Ms. Hunter's October 19, 2021, chart notes or Dr. Mah's November 2021 treatment records. (*Id*.)

On March 21, 2022, SAIF denied claimant's injury claim for a back condition. (Ex. 14-1). The denial stated that if claimant disagreed with the decision, he must mail, email, or fax a hearing request to the Workers' Compensation Board within 60 days. (*Id*.) The denial provided the Board's address, email address, and fax number. (*Id*.) In addition, at the bottom of the first page, the denial provided the website and phone number for the Workers' Compensation Division (WCD). (*Id*.)

That same day, Ms. Yost, a claims adjuster, called claimant to inform him that he could appeal the denial if he disagreed with SAIF's decision and that he had 60 days to do so. (Tr. 25). Claimant, unrepresented at the time, expressed his desire to appeal the denial. (Tr. 30). He asked Ms. Yost what he needed to do to appeal and if he had to see another physician. (*Id*.) Ms. Yost informed claimant that the denial explained the appeal process and that he could appeal the denial through the WCD. (Tr. 25).

Ms. Yost testified that she had talked to claimant quite a bit throughout the claim process (before the denial). (Tr. 27). She stated that claimant had difficulty understanding claim processes and procedures, that she would have to explain things to him multiple times, and that they would have the same conversation over and over. (Tr. 27-28).

Claimant testified that it took him a few weeks to figure out what he needed to do to appeal the denial. (Tr. 14). He called SAIF, his employer, and human resources for help. (Tr. 13-16).

In April 2022, claimant mailed appeal paperwork to the address at the bottom of the denial letter. (Tr. 12-13). He stated that after further discussion with human resources, he was under the impression that he had done everything he needed to do to appeal the denial. (Tr. 16).

The Board did not receive claimant's April 2022 paperwork. (Ex. 17-2; Tr. 17, 31).

On May 17, 2022, claimant's employer notified Ms. Yost that claimant would like to discuss the appeal process. (Tr. 26, 31). On May 18, 2022, Ms. Yost informed claimant by voicemail that the appeal process was described in the denial, that if he wanted to appeal, he should do so "quickly," that the 60-day deadline was "coming up fast," and that he could appeal through the WCD. (Tr. 26, 28). The 60-day deadline was May 20, 2022.

On July 28, 2022, an adult outreach worker with a behavioral health organization sent a fax on behalf of claimant to the WCD with a letter from claimant stating that he was appealing SAIF's decision. (Ex. 17). The cover page and claimant's letter referenced the Board, but were faxed to a WCD fax number. (Ex. 17-1, -2). Claimant's letter noted that he had previously tried to appeal, but that the appeal had not been received. (Ex. 17-2). That same day, the WCD emailed claimant's letter to the Board, indicating that he was requesting a hearing on the denial. (Ex. 17-3).

In September 2022, Dr. Mah opined that the work incident was a material contributing cause of the disability and need for treatment for claimant's lumbar strain and L4-5 disc extrusion conditions. (Ex. 19-3-4). He explained that there was a close temporal relationship between the onset of symptoms and the work incident and that the mechanism of injury was consistent with causing the conditions. (Ex. 19-3). In addition, Dr. Mah explained that the delay in treatment after the work incident was relatively short and that it was due to difficulties scheduling an appointment with the VA clinic. (Ex. 19-4).

CONCLUSIONS OF LAW AND OPINION

Good Cause

The ALJ found that claimant's hearing request was untimely filed and that the record did not establish "good cause" for the untimely filing.[1] Accordingly, the ALJ dismissed claimant's hearing request.

[1] Claimant does not challenge the ALJ's determination that claimant's hearing request was untimely filed (after 60 days but within 180 days of the denial). *See* ORS 656.319(1)(a).

On review, claimant contends that the record establishes "good cause" for the untimely filed hearing request. Based on the following reasoning, we agree with claimant's contention.

A request for hearing must be filed with the Board no later than 60 days after the mailing of the denial. *See* ORS 656.319(1)(a); OAR 438-005-0046(1). A hearing request filed after 60 days (but within 180 days) of a denial confers jurisdiction if the claimant establishes "good cause" for the late filing. *See* ORS 656.319(1)(b). It is the claimant's burden to establish "good cause" for an untimely filed hearing request. *See* ORS 656.319(1)(b).

The standard for determining "good cause" under ORS 656.319(1)(b) is analogous to the standard of "mistake, inadvertence, surprise, or excusable neglect" set forth in ORCP 71 B. *See Sekermestrovic v. SAIF*, 280 Or 723, 726 (1977); *Goodwin v. NBC Universal Media – NBC Universal*, 298 Or App 475, 485 (2019). The first step in a "good cause" analysis is to determine whether claimant has offered a reasonable excuse due to neglect, surprise, inadvertence, or mistake, for failing to timely request a hearing. *Goodwin*, 298 Or App at 486. The second step is to determine whether claimant's neglect, surprise, inadvertence, or mistake, constitutes "good cause" for the untimely filing of his hearing request. *Id*. at 488. A "good cause" determination under ORS 656.319(1)(b) must be liberally construed and viewed in the light most favorable to the party seeking relief, so as to avoid depriving a party of its day in court. *Id*. at 486-87.

Here, it is undisputed that claimant's hearing request was untimely filed (*i.e.*, on July 28, 2022, which was after 60 days, but within 180 days, of SAIF's March 21, 2022, denial). (Exs. 14, 17). Therefore, the determinative issue is whether claimant has met his burden to establish "good cause" for his late filing. *See* ORS 656.319(1)(b). After our review, we find that the record establishes a reasonable excuse due to a mistake or inadvertence. In addition, we find that the mistake or inadvertence constitutes "good cause" for claimant's untimely filed hearing request. We reason as follows.

On March 21, 2022, claimant expressed his desire to appeal the denial. (Tr. 3). Claimant testified that it took him several weeks to figure out what he needed to do and that he called SAIF, his employer, and human resources for help. (Tr. 13-16). Furthermore, Ms. Yost testified that claimant had difficulty understanding claim processes and procedures, that he required multiple explanations, and that they would have the same conversation over and over. (Tr. 27-28).

In this context, Ms. Yost informed claimant on two separate occasions that he had to appeal the denial through the WCD.[2] (Tr. 25-26, 28). Further, when claimant attempted to appeal the denial by mail in April 2022, the Board never received it. (Tr. 12-13). Moreover, on May 18, 2022, after claimant's employer informed Ms. Yost that claimant would like to discuss the appeal process, she informed claimant by voicemail that the process was described in the denial and that if he wanted to appeal the denial, he should do so "quickly." (Tr. 26). Although Ms. Yost advised claimant that the 60-day deadline was "coming up fast," she did not inform him that the deadline was May 20, 2022, only two days later. (*Id*.)

Finally, claimant testified that, after talking with human resources, he was under the impression that he had done everything he needed to do to appeal the denial. (Tr. 16). However, the Board never received claimant's April 2022 mailing and the 60-day deadline expired on May 20, 2022. (Ex. 17-2; Tr. 17, 31).

Under such circumstances, viewed in the light most favorable to claimant, we find that claimant's failure to file a timely hearing request was a result of a mistake or inadvertence due to his lack of sophistication and confusion regarding the claim requirements and procedures. *See Goodwin*, 298 Or App at 487 (the claimant's failure to file a timely hearing request due to lack of sophistication and confusion regarding the claim procedures was a mistake or inadvertence); *Roberto C. Ruiz-Gongora*, 74 Van Natta 324, 330 (2022) (the claimant's failure to file a timely hearing request due in part to his difficulty navigating the appeal process was a mistake and excusable neglect). Moreover, in that same light, we are persuaded that this mistake or inadvertence constitutes "good cause" for the untimely filed hearing request. *See* ORS 656.319(1)(b); *Goodwin*, 298 Or App at 486-87; *Ruiz-Gongora*, 74 Van Natta at 329 (good cause established where the claimant had difficulty understanding the process); *Samuel Goodwin II*, 72 Van Natta 508, 512-13 (2020) (on remand) (good cause established where the claimant had difficulty understanding the process and an Ombuds representative did not inform him that the 60-day deadline was the day they spoke on the phone). Accordingly, we reinstate claimant's hearing request. *See* ORS 656.319(1)(b).

[2] We note that hearing requests are properly filed with the Board, not the WCD. *See* OAR 438-005-0046(1). In addition, in July 2022, when claimant (with the help of an adult outreach worker) submitted a hearing request, he faxed it to the WCD, not the Board. (Ex. 17).

Compensability

To establish the compensability of his injury claim, claimant must prove that the work event was a material contributing cause of his disability or need for treatment. *See* ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). The parties do not dispute that this claim presents a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Andres Zargoza*, 74 Van Natta 566, 566 (2022). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

Here, we find Dr. Mah's opinion in support of compensability more persuasive than the contrary opinion of Dr. Bell. We reason as follows.

Dr. Mah, who treated claimant on multiple occasions after the work incident, opined that the work incident was a material contributing cause of the disability and need for treatment for claimant's lumbar strain and L4-5 disc extrusion conditions. (Ex. 19-3-4). He stated that there was a close temporal relationship between the onset of symptoms and the work incident and that the mechanism of injury was consistent with causing those conditions. (Ex. 19-3). In addition, Dr. Mah explained that claimant's delay in treatment after the work incident was relatively short and that it was due to difficulties scheduling an appointment with the VA clinic. (Ex. 19-4). Under such circumstances, we are persuaded by Dr. Mah's opinion, which was well explained and based on a sufficiently accurate history. *See Somers*, 77 Or App at 263; *Lisa L. Vedack*, 74 Van Natta 458, 464 (2022) (physician's opinion that was well reasoned and based on a sufficiently accurate history was persuasive).

In contrast, we are not persuaded by Dr. Bell's opinion. (Ex. 13). He opined that the work incident was not a material contributing cause of claimant's disability or need for treatment because of claimant's "large" delay in seeking treatment after the work incident and his arthritis issues, which Dr. Bell explained seemed more likely the cause of claimant's back pain. (Ex. 13-4-5). Dr. Bell based his opinion on a history that claimant's medical records did not reference back pain or a work-related injury until December 7, 2021. (Ex. 13-1-2). However, Ms. Hunter's October 19, 2021, chart notes and Dr. Mah's November 30, 2021, treatment records referenced significant back pain associated with the work incident. (Exs. 2-3-4, 3-1-2). In fact, it is not clear whether Dr. Bell had

even reviewed Ms. Hunter's chart notes or Dr. Mah's treatment records.[3] (Ex. 13-1-2). Furthermore, Dr. Bell did not address claimant's VA scheduling difficulties, as persuasively advanced by Dr. Mah. (Exs. 13, 19-4; Tr. 9-10). Under such circumstances, Dr. Bell's opinion was not based on a sufficiently complete or accurate history. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (physician's opinion based on an incomplete or inaccurate history was not persuasive); *Tina L. Jung*, 71 Van Natta 1044, 1049-50 (2019) (physician's opinion based on an incomplete and inaccurate review of the medical records was unpersuasive). Further, his opinion was not responsive to Dr. Mah's persuasive opinion. *See Louise Richards*, 57 Van Natta 80, 81 (2005) (physician's opinion unpersuasive when it did not rebut or respond to contrary opinion in the record).

Under such circumstances, we find that the record, based on Dr. Mah's opinion, persuasively establishes that the work incident was a material contributing cause of claimant's disability or need for treatment for a back condition. *See* ORS 656.005(7)(a); ORS 656.266(1). Therefore, claimant has met his burden of proof. *Id*. Consequently, claimant's injury claim for a back condition is compensable. *Id*.

Claimant's counsel is entitled to an assessed attorney fee for services at the hearing level and on review, payable by SAIF. ORS 656.386(1). After considering the factors prescribed in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award for claimant's counsel's services at the hearing level and on review is $17,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by the hearing record, claimant's appellate briefs, and his attorney's uncontested fee submission), the complexity of the issues, the value of the interests involved, the risk that claimant's counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *Se* ORS 656.386(2); OAR 438-015 0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

[3] Dr. Bell stated that there were "also appended a number of chiropractic notes." (Ex. 13-2). However, he did not otherwise comment on the substance or content of those records. (*Id.*)

Penalty and Penalty-Related Attorney Fee

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts then due plus assessed attorney fees. Whether a denial was an unreasonable resistance to the payment of compensation depends on whether, from a legal standpoint, the carrier had a legitimate doubt about its liability. *See Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available at the time of the denial. *See Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

Here, we find that SAIF had a legitimate doubt as to its liability at the time of its denial based on Dr. Bell's opinion. (Ex. 13). Claimant contends that all of the expert medical opinions support compensability. However, Dr. Bell opined that the work incident was not a material contributing cause of claimant's disability or need for treatment. (Ex. 13-5). Although we are ultimately not persuaded by Dr. Bell's opinion (for the reasons stated above), SAIF was entitled to pursue its denial for our determination regarding the persuasiveness of that opinion. *See, e.g.*, *Serge Alexandre*, 74 Van Natta 410, 413 (2022) (the carrier had a legitimate doubt at the time of the denial based on a physician's opinion that was ultimately found unpersuasive); *Marilyn A. Hodges*, 50 Van Natta 234, 236 (1998) (not unreasonable for a carrier to maintain its denial to await the ALJ's decision regarding compensability of the claim that involved an assessment of the persuasiveness of medical opinions). Accordingly, we do not award a penalty or penalty-related attorney fee.

ORDER

The ALJ's order dated November 9, 2022, is reversed. Claimant's July 28, 2022, hearing request is reinstated. SAIF's denial is set aside and the claim is remanded to SAIF for further processing according to law. For services at the hearing level and on review, claimant's attorney is awarded an assessed attorney fee of $17,000, to be paid by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. Claimant's request for penalties and related attorney fees is denied.

Entered at Salem, Oregon on August 15, 2023